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No. 97-___

In The

Supreme Court of the United States

October Term, 1996

SUSAN LYNN ROBERTS,

Petitioner,

vs.

CHARLES TIMOTHY KLING,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SUSAN LYNN ROBERTS,	)	
Plaintiff,	)	
-vs-	)	No. CIV 94-1318 LH/WWD
CHARLES TIMOTHY KLING,	)	
Defendant.	)	

ORDER

(Filed Nov. 08, 1995)

THIS MATTER comes before the Court on Defendant's Motion for Summary Judgment (Docket No. 22). A memorandum opinion was entered on this date. For the reasons set forth therein, the Court **FINDS** that Defendant's Motion for Summary Judgment is well taken and will be **GRANTED**.

IT IS, THEREFORE, ORDERED that Defendant's Motion for Summary Judgment **IS GRANTED** and this case **IS DISMISSED** with prejudice.

/s/ LeRoy Hansen
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SUSAN LYNN ROBERTS,	)	
Plaintiff,	)	No. CIV 94-1318 LH/WWD
-vs-	)	
CHARLES TIMOTHY KLING,	)	
Defendant.	)	

MEMORANDUM OPINION

(Filed Nov. 08, 1995)

THIS MATTER came on for a hearing before the Court on August 17, 1995, on Defendant's Motion for Summary Judgment (Docket No. 22). The Court, having reviewed the submissions and arguments of the parties, finds that Defendant's Motion for Summary Judgment is well taken and should be granted.

Plaintiff brought this 42 U.S.C. § 1983 action in federal court alleging violations of her Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights stemming from the defendant allegedly filing a false and erroneous criminal complaint against her. The core of Plaintiff's claims against Defendant is that Defendant knowingly, or with reckless disregard, made material misrepresentations or omissions in swearing out a complaint for the arrest of Plaintiff. Plaintiff argues that Defendant could

not reasonably believe Plaintiff could be subject to jurisdiction for violating New Mexico's Custodial Interference statute[1] and that he failed to apprise the magistrate of this failure of jurisdiction. She contends that these misrepresentations or omissions resulted in the issuance of an arrest warrant and subsequent arrest and extradition of Plaintiff from Oregon for violating New Mexico's Custodial Interference statute. The criminal complaint against Plaintiff was eventually dismissed by the trial court for lack of jurisdiction. The New Mexico Court of appeals affirmed the trial court's dismissal.[2]

Defendant has moved for summary sudgment [sic] on the basis of both absolute immunity and qualified immunity.

Standard for Summary Judgment

A summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). On review, the party opposing summary judgment benefits from all reasonable doubts in

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[1] NMSA 1978, § 30-4-4(B) (Cum. Supp. 1993). The statute provides as follows:

> B. Custodial interference consists of any person, having a right to custody of a child, maliciously taking, detaining, concealing or enticing away or failing to return that child without good cause and with the intent to deprive permanently or for a protracted time another person also having a right to custody of that child of his right to custody. Whoever commits custodial interference is guilty of a fourth degree felony.

[2] *New Mexico v. Roberts*, No. 14,976 (N.M. Ct. App. 1993).

determining whether a genuine material factual issue exists. *Id.* at 321-323.

Background

The material facts relevant to the issues in this case are not in dispute. Plaintiff is the mother of two children from a now terminated marriage to Mr. Ronald Roberts. On July 9, 1992, Plaintiff came to New Mexico, Dona Ana County, and signed a Parenting Plan, which was incorporated by reference into the Final Custody Order filed in their divorce case on July 21, 1992, in the Third Judicial District Court in Dona Ana County. Under the provisions of this Plan and Order, Mr. Roberts retained primary physical custody in New Mexico of the two children and Plaintiff was granted delineated visitation privileges, including the right to a six-week visitation period each summer. After executing the plan in Dona Ana County on July 9, 1992, Plaintiff requested that Mr. Roberts deliver the children to Plaintiff's hotel room in El Paso, Texas. Plaintiff then took the children with her to her home in Oregon for a planned six-week visit. There is a dispute in the record as to when the parents had agreed that the children would be returned to New Mexico. Mr. Roberts alleges that they agreed to have the children back in New Mexico two days prior to the commencement of school, or August 17, 1992. Six weeks from July 9, 1992, however, would be August 20, 1992. As will be explained below, this fact is not material to the issues before the Court.

Mr. Roberts contacted Plaintiff on August 16, 1992, to determine the details associated with his children's return to New Mexico. Plaintiff informed Mr. Roberts that

she had until August 20 to return the children, but that in any event, she intended to keep them with her in Oregon and to enroll them in a local school. Mr. Roberts then contacted his divorce attorney, Jerald A. Valentine, and informed him of the conversation he had with Plaintiff. Mr. Valentine contacted Steven Stevers, Plaintiff's divorce attorney, and informed him of Plaintiff's stated intent not to return the children. After discussions with Plaintiff, Mr. Stevers subsequently contacted Mr. Valentine and informed him that the children would be returned to New Mexico on August 21, 1992, and relayed the associated flight information. Mr. Roberts met the designated flight at the airport on August 21, 1992, however, the children were not on the plane.

Mr. Roberts then contacted Michael Sheehy, an attorney in Tualatin, Oregon, in order to obtain a Warrant in Lieu of Writ of Habeas Corpus in Washington County, Oregon. The warrant commanded that the children be taken into custody as they were being illegally held by Plaintiff. After attempted service of the warrant on August 21, 1992, Mr. Sheehy informed Mr. Roberts that the deputy sheriff was told that Plaintiff had vacated her last known address and had taken the children to Alaska.

Mr. Valentine contacted Third Judicial District Attorney Douglas Driggers and informed him of the undisputed facts outlined above, with the exception of the fact that the children were delivered to the Plaintiff's El Paso, Texas hotel room on July 9, 1992. After examining New Mexico's Custodial Interference statute and based on his discussions with Mr. Valentine, District Attorney Driggers concluded that the statute had been violated, that there was probable cause to believe that each and every

element of custodial interference had been committed, and that a criminal complaint should be filed. District Attorney Driggers then instructed Defendant to meet with Mr. Roberts on August 21 and verify the information relayed to him by Mr. Valentine and to obtain relevant documents. District Attorney Driggers also instructed Defendant to then sign and file a criminal complaint, as prepared and approved by an assistant district attorney, and to obtain a warrant for the arrest of Plaintiff.

Defendant met with both Mr. Valentine and Mr. Roberts and obtained verification of the facts relayed by Mr. Valentine to District Attorney Driggers. In addition, Defendant obtained copies of the Final Custody Order and the executed Parenting Plan. Based on this information, Defendant swore out a criminal complaint before a Magistrate Judge in the Magistrate court of Dona Ana County. The criminal complaint included a Statement of Facts outlining the information given him by Mr. Roberts and was prepared and approved by Alfred J. Perez, Chief Deputy District Attorney. The magistrate judge found that probable cause existed and subsequently issued a warrant for Plaintiff's arrest.

Plaintiff was arrested in Oregon on November 24, 1992, still in possession of the two children and having had no further contact with Ronald Roberts after the August 16 telephone conversation. Plaintiff was extradited to New Mexico on February 4, 1993. At a February 15, 1993 preliminary hearing, Judge Maynez found probable cause for the charges and a criminal information was filed on February 17, 1993. Plaintiff was present at the Preliminary Hearing and was represented by Assistant Public Defender Samuel Z. Damon. Mr. Damon filed a

motion to dismiss based on lack of jurisdiction in July, 1992, nearly five months after Plaintiff's Preliminary Hearing. District Judge Beal granted Plaintiff's motion to dismiss and the State of New Mexico appealed. The New Mexico Court of Appeals affirmed the dismissal.

Plaintiff argues that Defendant falsely swore that the violation of the Custodial Interference statute took place in the State of New Mexico, within Dona Ana County on or about August 17, 1992. Plaintiff's argument to the trial court, prior to the charges against her being dismissed, and again here in this Court, is that the State of New Mexico lacked jurisdiction over her because an essential element of the crime (i.e., either the taking of the two children or the failing to return the two children) did not take place in New Mexico. It is undisputed that neither Plaintiff nor the two children were in the State of New Mexico at any time on or about August 17, 1992.

Defendant Kling is Entitled to Absolute Immunity

Defendant's first basis for summary judgment is that he is entitled to absolute immunity from suit for damages because he was acting at the direction of District Attorney Driggers in swearing out the criminal complaint for the arrest of Plaintiff and was, therefore, performing the function of a prosecutor in initiating and pursuing a criminal prosecution for the state.

Government prosecutors enjoy absolute immunity from suit under 42 U.S.C. § 1983 for monetary relief where the challenged conduct is intimately involved with the judicial proceeding. *Imbler v. Pachtman*, 424 U.S. 409

(1976). The purpose of this immunity is to protect prosecutors from the "serious danger that the decision to initiate proceedings will provoke a retaliatory response." *Id.* Thus, a prosecutor enjoys absolute immunity from damages under Section 1983 when he "initiat[es] a prosecution and . . . present[s] the State's case." *Id.* at 431. However, such immunity does not extend to actions of a non-prosecutorial nature, such as purely investigative, advisory or administrative tasks. *See Burns v. Reed*, 500 U.S. 478 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.16 (1982); *Snell v. Tunnel*, 920 F.2d 673, 686 (10th Cir. 1990).

The Supreme Court's absolute immunity cases illustrate the critical importance of an official's "function" in this inquiry. "[I]mmunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches." *Forrester v. White*, 484 U.S. 219, 227 (1988). "[A] functional approach to immunity requires that those performing like functions receive like immunity." *Snell v. Tunnell*, 920 F.2d 673, 690 (10th Cir. 1990), *cert. denied*, 499 U.S. 976 (1991). Thus, the fact that Defendant was an investigator for the district attorney does not change the nature of the inquiry as to whether he is entitled to absolute immunity for swearing out a criminal complaint.

Plaintiff points to the Supreme Court's decision in *Malley v. Briggs*, 475 U.S. 335 (1986) as being dispositive. In *Malley*, a police officer sought absolute immunity from suit for his alleged wrongful conduct in applying for arrest warrants. Looking to the common law availability of immunity at the time of the passage of 42 U.S.C. § 1983, the Court concluded the police officer was entitled

only to the defense of qualified immunity. *Id.* at 340-341.[3] Thus, Plaintiff argues, Defendant, like the police officer in *Malley*, is not entitled to absolute immunity. However, I believe Plaintiff's reading of *Malley* is too expansive and ignores subsequent Supreme Court decisions.

Malley dealt with the situation of an independent police officer seeking a judicial determination of probable cause for the issuance of arrest warrants. The facts of this case are distinguishable. First, Defendant was not a police officer capable of depriving people of valuable rights. *See Atkins v. Lanning*, 556 F.2d 485, 488-489 (10th Cir. 1977). Instead, he worked directly for the district attorney. In addition, the undisputed facts disclose that Driggers made the determination, after his initial discussion with Mr. Valentine and his review of New Mexico's Custodial Interference statute, that if the information relayed to him was verified, probable cause for the arrest of Plaintiff existed. Defendant investigated and verified the information originally presented to Driggers and helped prepare a criminal complaint. The criminal complaint was then approved by Chief Deputy District Attorney Perez. Thus, at the time Defendant swore out the criminal complaint before the magistrate judge, District Attorney Driggers had already determined that probable cause existed for Plaintiff's arrest.

In *Buckley v. Fitzsimmons*, 113 S. Ct. 2606 (1993), the Court concluded that in determining whether prosecutors

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[3] In 1871, "one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause." *Id.*

were entitled to absolute immunity, the question was whether they were functioning as advocates for the state. *Id.* at 2616. The Court held that "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* Here, District Attorney Driggers concluded probable cause for Plaintiff's arrest existed and directed Defendant to swear out a criminal complaint in support of that conclusion. Thus, I conclude that in seeking an arrest warrant in this case, at the request of District Attorney Driggers, Defendant was functionally initiating a criminal prosecution, an act for which he is entitled to absolute immunity from suit under 42 U.S.C. § 1983. *Lerwill v. Joslin*, 712 F.2d 435 (10th Cir. 1983).

Even were I to conclude that Defendant was not entitled to absolute immunity, the undisputed material facts disclose that he is entitled to the defense of qualified immunity.

Defendant Kling is Entitled to Qualified Immunity

In evaluating the defense of qualified immunity, the Court must compare the "objective reasonableness" of the conduct complained of with the state of the law at the time of the alleged violation. *Harlow*, 457 U.S. at 818. "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* for plaintiffs to defeat a claim of qualified immunity, the "contours of the right must be sufficiently clear that a reasonable

official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Once a defendant raises the defense of qualified immunity, the plaintiffs must "come forward with facts or allegations to show both that the defendant's alleged conduct violated the law and that law was clearly established when the alleged violation occurred." *Pueblo Neighborhood Health Ctrs. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988). The defendant prevails unless such a showing is made on both elements. *Harlow*, 457 U.S. at 819.

Under the facts of this case, Defendant is alleged to have made material omissions or misrepresentations as to information he supplied in swearing out a criminal complaint against Plaintiff. In *Salmon v. Schwarz*, 948 F.2d 1131 (10th Cir. 1991), the court held that the law was, at that time, clearly established that the omission of material information from an arrest affidavit violated the Fourth Amendment. *Id.* at 1139. The court further held that if a police officer makes a false statement or omission knowingly or intentionally, or with reckless disregard for the truth in an affidavit for a warrant, then the false statement or omission must be disregarded in deciding whether the affidavit demonstrates probable cause. *Id.*

Thus, in order for Plaintiff to overcome Defendant's assertion of qualified immunity, Plaintiff must demonstrate a genuine issue of material fact as to each of the following for each alleged omission or misrepresentation of fact:

1. There was a misrepresentation or omission in Kling's affidavit or criminal complaint;

2. The misrepresentation or omission was material to the determination by the magistrate of probable cause; and

3. That Kling knowingly, intentionally, or with reckless disregard for the truth made the misrepresentation or omission.

Plaintiff points to three separate omissions or misrepresentations:

1. Kling represented that the crime allegedly committed by the plaintiff (custodial interference) occurred within the state of New Mexico, Dona Ana County.

2. Kling failed to disclose that the plaintiff was not in New Mexico on August 17, 1992, or that Plaintiff picked the children up in El Paso, Texas, on July 9, 1992.

3. Kling failed to state that there was a dispute as to when the children were to be returned – August 17 (Mr. Robert's position) or August 20 (Plaintiff's position).

Plaintiff contends that at the very least, there exists a genuine issue of material fact as to whether Defendant acted with deliberate indifference for the truth in making the above omissions and misrepresentations.

Defendant asserts that the above omissions or misrepresentations are either not material to the determination of probable cause, were not omissions or misrepresentations, or it was reasonable for Defendant to make the challenged statements:

1. Kling's statement in the criminal complaint that Plaintiff committed the offense in Dona Ana County on or about August 17, 1992

is, according to Defendant, a statement regarding his belief as to jurisdiction and the time the offense was committed. Defendant argues this was not a statement of fact and that he can be denied the defense of qualified immunity only if "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that Dona Ana County had jurisdiction. Defendant argues that the law was not clearly established at the time Kling's affidavit was made that jurisdiction for the offense of custodial interference depended on Plaintiff either physically taking the children from the state of New Mexico, rather than having the children delivered to a hotel room in El Paso, Texas, or having been physically in the State of New Mexico at the time Plaintiff failed to return the children to her ex-husband. Defendant states that his belief that Dona Ana County had jurisdiction was objectively reasonable, particularly when it took the court and the attorneys involved over five months to determine that jurisdiction was even at issue.

2. Defendant argues that although neither the affidavit nor the criminal complaint specifically disclose the location of Plaintiff on August 17, 1992, it can be inferred from the information in the documents that Plaintiff was not in the State of New Mexico. Therefore, Defendant challenges whether there has been any omission. Further, Defendant asserts that whether Plaintiff was in New Mexico on August 17 is immaterial as presence in New Mexico at the time the children were to be returned is not required under the statute.

> 3. Defendant contends that the affidavit does disclose that there was a dispute surrounding the date when the children were to be returned, in that Plaintiff told her ex-husband that she would return the children on August 20. Further, the complaint was sworn out on August 21. The dispute surrounding the date is whether the children were to be returned on the 17th or by the 20th. The difference would have had no impact on the magistrate's finding of probable cause.

I address Plaintiff's first two allegations of material omissions or misrepresentations in the criminal complaint simultaneously because they are, in reality, the same issue. I conclude that Defendant did not fail to disclose to the magistrate that Plaintiff was not in the State of New Mexico "on or about" August 17, 1992. The Statement of Facts prepared and sworn to by Defendant clearly disclosed that Plaintiff was in Oregon on August 16, 1992, and subsequently fled her last known address, with the two children, by August 21, 1992. Although her location on or about August 17, 1992, was not specified in the Statement of Facts in Support of Criminal Complaint, I find the record clearly discloses Plaintiff was not in New Mexico on or about that date. Further, I conclude that the statement in the criminal complaint that "on or about the 17th day of August, 1992, in the County of Dona Ana, State of New Mexico, the defendant did . . . " is jurisdictional, not factual. The criminal complaint alleged a violation of New Mexico's Custodial Interference statute for Plaintiff's *failure to return* the children. Thus, I construe Plaintiff's challenge to be directed at the propriety of

Defendant's actions in making the "misrepresentation" that Dona Ana County had jurisdiction.

The Court in *Malley* concluded that a police officer was *per se* qualifiedly immune from suit where a magistrate acts mistakenly in issuing an arrest warrant but within the range of professional competence of a magistrate. *Malley*, 475 U.S. at 346 n.9. I conclude that the magistrate had the information before him to reasonably determine that Plaintiff was not in the State of New Mexico on or about August 17, 1992. As a result, I also conclude that the magistrate made a probable cause determination within his range of professional competence. Therefore, I must determine whether an officer of reasonable professional competence would, nonetheless, have requested the warrant under these circumstances. *Id.*

Contrary to Plaintiff's assertions, I believe Defendant acted as a reasonably competent officer in seeking a warrant for Plaintiff's arrest. At the outset, it must be made clear that this case does not present the situation where an officer fails to disclose material and potentially exculpatory information to the magistrate. Instead, Plaintiff contends that a criminal investigator for the District Attorney acted unreasonably in asserting that New Mexico had jurisdiction, even though a Magistrate, District Attorney Driggers, and Chief Deputy District Attorney Perez all concluded such jurisdiction existed. Indeed, the District Attorney appealed the dismissal of the case with full knowledge of the fact that Plaintiff was not in New Mexico at any time on or about August 17, 1992. No material information was withheld by Defendant from

the magistrate. Given the technical nature of the jurisdictional inquiry, I cannot conclude that Defendant Kling acted unreasonably in seeking a warrant for Plaintiff's arrest. Obviously, if lawyers and judges can disagree on this issue, officers of reasonable competence could as well. *Id.* at 341.

Similarly, based on the facts before me it is undisputed that Defendant did not make a material factual omission or misrepresentation in failing to specifically point out in his Statement of Facts that a disagreement between Plaintiff and Mr. Roberts existed as to the date the children were to be returned to New Mexico. First, that information could be inferred from the Statement of Facts. Second, the dispute was, and continues to be, irrelevant to the determination of whether probable cause existed that the offense in question had been committed. It is undisputed that the criminal complaint was sworn out on August 21, 1992, using the language that "on or about August 17, 1992" an offense had been committed. Plaintiff's side of the dispute was that she was to return the children to New Mexico by August 20, 1992. Even if this had been more forcefully articulated to the magistrate, the determination of probable cause would not have been affected.

For the above reasons, Defendant Kling is entitled to qualified immunity for his actions in signing and filing the Criminal Complaint and the Statement of Facts in Support of the Criminal Complaint. Plaintiff cites no factual support that Defendant intentionally filed a criminal complaint knowing that New Mexico lacked jurisdiction over Plaintiff, and I conclude that Defendant's actions were not objectively unreasonable.

Because of my resolution of the issue of Defendant's swearing out a criminal complaint in Dona Ana County, Plaintiff's other claims must fail as well. First, Plaintiff's claim based on the filing by FBI Agent Lacey of federal charges of unlawful flight to avoid prosecution lacks any factual support. Defendant did not file these federal charges. It is undisputed that District Attorney Driggers contacted the FBI and asked that federal charges be initiated against Plaintiff. Given my decision that Defendant did not act unreasonably in seeking an arrest warrant for Plaintiff in New Mexico, he cannot now be liable for supplying Agent Lacey with the same information he previously supplied to the magistrate. Similarly, Defendant cannot be liable for supplying this same public information to the media.

Accordingly, Defendant's Motion for Summary Judgment should be granted. An order in accordance with this memorandum opinion shall be entered.

/s/ Leroy Hansen
UNITED STATES
DISTRICT JUDGE

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